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October 18, 2019

Office of General Counsel
Rules Docket Clerk
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re: Docket No. FR-6111-P-02
HUD's Implementation of the Fair Housing Act's
Disparate Impact Standard

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments to HUD's proposed rule titled "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard" (the "Proposed Rule").

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households in the country.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing, and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh's original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

In our view, the history of fair housing in this country, and disparate impact specifically, counsels against the Proposed Rule. As further discussed below, the Proposed Rule fails to provide protections for PHAs, prioritizes profits at the expense of the communities we serve, does nothing

to address barriers to affordable housing development, and likely exposes PHAs to more frivolous lawsuits. We therefore urge HUD to reconsider its Proposed Rule.

As an initial matter, we note that we are not opposed to changes to the disparate impact standard. We welcome a proposed rule that provides specific protections for PHAs against frivolous fair housing lawsuits. We further welcome incorporation of specific reasonable defenses for PHAs to employ against disparate impact cases. The Proposed Rule, however, fails to do either. In fact, HUD specifically acknowledges that, rather than addressing PHA concerns, the Proposed Rule responds to comments and concerns regarding "the business of insurance."

HUD proposes to immunize models that have a discriminatory effect from fair housing liability where such models are "produced, maintained, or distributed by a recognized third party that determines industry standards" or have otherwise "been subjected to critical review" and "been validated by an objective and unbiased neutral third party" that found the model "accurately predicts risk or other valid objectives." Considered in the broader historical context of fair housing issues in the United States, it is not unreasonable to liken such models to the redlining efforts of insurance companies and financial institutions. Such efforts adversely impact the communities we serve. We are therefore concerned that the strides that have been made to eliminate redlining and curb other facially neutral practices that nevertheless have a discriminatory impact on our communities could be overturned by the Proposed Rule.

Further, the proposal that "a valid interest or legitimate objective such as … profit" is sufficient to defend against discriminatory impact liability is also greatly concerning. The communities we serve are historically underserved and underprivileged. HUD programs are specifically designed to serve these communities and protect their right to fair housing practices. It seems inapposite for HUD to now put forth regulations that would protect a defending party's profit interest over fair housing rights.

It is also important to note that the Proposed Rule does nothing to address the fact that HUD regularly withholds necessary approvals for affordable housing development because of concerns over the potential disparate impact on these communities based on the location of the development, i.e., site and neighborhood standards review. Concerns over the concentration of poverty and minorities are barriers to affordable housing development in the very areas that need such development. Many if not all PHAs in major cities serve "majority-minority" populations, which in practice means that any affordable development undertaken by such PHAs will necessarily affect minority populations. Disparate impact should not prevent construction and redevelopment of affordable housing in major cities. HUD, however, fails to address this issue in the Proposed Rule. We urge HUD to reconsider the Proposed Rule and instead put forth proposals that reasonably protect both PHAs and the communities we serve while appropriately facilitating the mission of providing affordable housing in those same communities.

Lastly, we understand that HUD's goal is "to amend HUD's interpretation of the Fair Housing Act's disparate impact standard" to better align with case law and provide further clarity. We are deeply concerned, however, that the Proposed Rule does neither. Rather than provide consistency and clarity for housing providers and the communities we serve, the Proposed Rule seems to all but eliminate the ability to challenge discrimination under a disparate impact analysis.

HUD published its "Implementation of the Fair Housing Act's Discriminatory Effects Standard" final rule on February 15, 2013 (the "Disparate Impact Rule"). In its summary of the Disparate Impact Rule, HUD stated that the Rule "formalizes [HUD's] long-standing recognition of discriminatory effects liability under the [Fair Housing] Act, and, for purposes of providing consistency nationwide, formalizes a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the [Fair Housing] Act." The Supreme Court issued its decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) ("*Inclusive Communities*") approximately two years after HUD published the Disparate Impact Rule. In *Inclusive Communities,* the Supreme Court appropriately held that disparate impact claims are both recognized and allowed under the Fair Housing Act.

We have reviewed the decision in *Inclusive Communities* and find nothing in *Inclusive Communities* that justifies the Proposed Rule, which risks dismantling disparate impact liability in its entirety. As recognized in *Inclusive Communities,* the Disparate Impact Rule provides a clear, objective burden-shifting framework to determine disparate impact liability. This determination is extremely fact-specific and appropriately requires analysis on a case-by-case basis. Such analysis should be left to the courts and, indeed, courts since *Inclusive Communities* have applied the burden-shifting framework accordingly.

The clarity created by the Disparate Impact Rule and solidified in *Inclusive Communities* would be eliminated by the Proposed Rule. As the comparison provided in Attachment 1 demonstrates, we are concerned that the Proposed Rule contradicts the burden shifting framework as presently understood and conflates burden of proof with available defenses and procedural issues. The confusion the Proposed Rule would create surrounding the proper standard of disparate impact liability would have a particularly negative consequence for PHAs. Because the overwhelming majority of individuals served by PHAs are protected under the Fair Housing Act, PHAs face increased exposure to fair housing lawsuits. Given this increased exposure, confusion around the standard may lead to more lawsuits, not fewer.

Again, we urge HUD to reconsider the Proposed Rule and welcome proposals consistent with the concerns raised here.

Thank you for the opportunity to comment on the Proposed Rule. If you have any questions, please do not hesitate to contact us.

Sincerely,

Sunia Zaterman	Stephen I. Holmquist
Executive Director	Member
CLPHA	Reno & Cavanaugh, PLLC

Attachment 1

Comparison of Proposed Changes to 24 CFR § 100.500 Under the Proposed Rule

§ 100.500 Discriminatory effect prohibited.

(a) *General.* Liability may be established under the Fair Housing Act based on a specific policy's or practice's discriminatory effect~~, as defined in paragraph (a) of this section,~~ on members of a protected class under the Fair Housing Act even if the specific policy or practice was not motivated by a discriminatory intent.

~~The practice may still be lawful if supported by a legally sufficient justification, as defined in paragraph (b) of this section. The burdens of proof for establishing a violation under this subpart are set forth in paragraph (c) of this section.~~ ~~**(a)*Discriminatory effect.*** A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.~~

~~**(b)*Legally sufficient justification.***~~

~~**(1)** A legally sufficient justification exists where the challenged practice:~~

~~**(i)** Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42U.S.C. 3613 or 3614; and~~

~~**(ii)** Those interests could not be served by another practice that has a less discriminatory effect.~~

~~**(2)** A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in paragraphs (c)(2) and (c)(3) of this section.~~

~~**(c)*Burdens of proof in discriminatory effects cases.***~~

~~**(1)** The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.~~

~~**(2)** Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.~~

~~**(3)** If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.~~

(d) ***Relationship to discriminatory intent.*** A demonstration that a practice is supported by a legally sufficient justification, as defined in paragraph (b) of this section, may not be used as a defense against a claim of intentional discrimination.

(b) *Prima facie burden.* To allege a prima facie case based on an allegation that a specific, identifiable policy or practice has a discriminatory effect, a plaintiff or the charging party (collectively, ''plaintiff'') must state facts plausibly alleging each of the following elements:

(1) That the challenged policy or practice is arbitrary, artificial, and unnecessary to achieve a valid interest or legitimate objective such as a practical business, profit, policy consideration, or requirement of law;

(2) That there is a robust causal link between the challenged policy or practice and a disparate impact on members of a protected class that shows the specific practice is the direct cause of the discriminatory effect;

(3) That the alleged disparity caused by the policy or practice has an adverse effect on members of a protected class;

(4) That the alleged disparity caused by the policy or practice is significant; and

(5) That there is a direct link between the disparate impact and the complaining party's alleged injury.

(c) *Failure to allege a prima facie case.* A defendant, or responding party, may establish that a plaintiff's allegations do not support a prima facie case of discriminatory effect under paragraph (b) of this section, if:

(1) The defendant shows that its discretion is materially limited by a third party such as through:

(i) A Federal, state, or local law; or

(ii) A binding or controlling court, arbitral, regulatory, administrative order, or administrative requirement;

(2) Where a plaintiff alleges that the cause of a discriminatory effect is a model used by the defendant, such as a risk assessment algorithm, and the defendant:

(i) Provides the material factors that make up the inputs used in the challenged model and shows that these factors do not rely in any material part on factors that are substitutes or close proxies for protected classes under the Fair Housing Act and that the model is predictive of credit risk or other similar valid objective;

(ii) Shows that the challenged model is produced, maintained, or distributed by a recognized third party that determines industry standards, the inputs and methods within the model are not determined by the defendant, and the defendant is using the model as intended by the third party; or

(iii) Shows that the model has been subjected to critical review and has been validated by an objective and unbiased neutral third party that has analyzed the challenged model and found

that the model was empirically derived and is a demonstrably and statistically sound algorithm that accurately predicts risk or other valid objectives, and that none of the factors used in the algorithm rely in any material part on factors that are substitutes or close proxies for protected classes under the Fair Housing Act; or

(3) The defendant demonstrates that the plaintiff has failed to allege sufficient facts under paragraph (b) of this section.

(d) *Burdens of proof for discriminatory effect.* If a case is not resolved at the pleading stage, the burden of proof to establish that a specific, identifiable policy or practice has a discriminatory effect, are as follows:

(1) *Plaintiff's burden.* (i) A plaintiff must prove by the preponderance of the evidence, through evidence that is not remote or speculative, each of the elements in paragraphs (b)(2) through (5) of this section; and

(ii) If the defendant rebuts a plaintiff's assertion that the policy or practice is arbitrary, artificial, and unnecessary under paragraph (b)(1) of this section by producing evidence showing that the challenged policy or practice advances a valid interest (or interests), the plaintiff must prove by the preponderance of the evidence that a less discriminatory policy or practice exists that would serve the defendant's identified interest in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.

(2) *Defendant's burden.* The defendant may, as a complete defense:

(i) Prove any element identified under paragraph (c)(1) or (2) of this section;

(ii) Demonstrate that the plaintiff has not proven by the preponderance of the evidence an element identified under paragraph (d)(1)(i) of this section; or

(iii) Demonstrate that the alternative policy or practice identified by the plaintiff under paragraph (d)(1)(ii) of this section would not serve the valid interest identified by the defendant in an equally effective manner without imposing materially greater costs on, or creating other material burdens for, the defendant.